**KAMAWANG ENTERPRISE SDN BHD & ANOR** A

**v.**

**MASCOM (M) SDN BHD & ANOR**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-121-2000]
9 NOVEMBER 2009

***CIVIL PROCEDURE:*** *Contempt of court - Order of committal - Defendants' wilful disobedience of a court order - Whether contempt proven - Whether committal order should include an order that 2nd defendant be committed to prison until he complies with said court order* C

The only issue in this case was whether a committal order against the defendants should include an order that the 2nd defendant, the 1st defendant's director, be committed to prison for contempt of court resulting from the defendants' wilful disobedience of a court order dated 12 June 2009 ('said court order'). D

**Held (2nd defendant to be committed to Kepayan prison and to be there imprisoned until further order):** E

**(1)** On the facts of the present case, the 1st and 2nd defendants' disobedience of the said court order was wilful and blatant and was without doubt an interference with the administration of justice. It was obvious that the defendants were (and still are) determined not to comply with the said court order. Having carefully considered both parties' affidavit evidence, it was clear that the 1st plaintiff had proven beyond any reasonable doubt that the defendants were in contempt of court. An order for committal to be effective must include the punishment for the contempt, and for the contempt committed by the 2nd defendant the deterrent factor should be the paramount consideration. Thus, the committal order should include an order that the 2nd defendant be committed to prison until he complies with the said court order. (paras 21-24) F G H

**Case(s) referred to:**
*Attorney General v. Hislop & Anor [1991] 1 All ER 911* ***(refd)***
*Corcoran v. Corcoran [1950] 1 All ER 495* ***(refd)***
*Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC* ***(refd)***
*Hock Hua Bank v. Sahari Murid [1980] 1 LNS 92 FC* ***(dist)***
*Lightfoot v. Lightfoot [1989] 1 FLR 414* ***(refd)*** I
*Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC* ***(refd)***

*Re Bramblevale Ltd [1970] Ch 128* ***(refd)***
*Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 45 r. 6

**Other source(s) referred to:**
*Halsbury's Laws of Malaysia*, vol 2, p. 75

*For the 1st plaintiff - Datuk Kong Hong Ming; M/s Lee & Kong*
*For the defendant - Maureen Sinsua; M/s Sulong & Sinsua*

*Reported by Suresh Nathan*

## JUDGMENT

**Abdul Rahman Sebli JC:**

**[1]** The issue in this case is whether the committal order against the defendants should include an order that the 2nd defendant, Datuk Lawrence Sinsua be committed to prison for contempt of court.

### The Facts

**[2]** On 9 September 2009 I made an order of committal against the defendants for contempt of court pursuant to the 1st plaintiff's notice of motion dated 14 July 2009. Datuk Kong Hong Ming, learned counsel for the 1st plaintiff by letter dated 14 September wrote to the court seeking an appointment to seek clarification on the terms of the committal order. In the letter learned counsel explained that due to inadvertence on his part he omitted to seek the court's direction as to the length of imprisonment that is to be imposed on the 2nd defendant. Counsel for the defendants acknowledged receipt of the letter on the same date, ie, 14 September 2009.

**[3]** However before the date of appointment for clarification was fixed by the court, and without the knowledge of the 1st plaintiff, learned counsel for the defendants filed the draft committal order, which had not been agreed upon by the 1st plaintiff, for sealing. The order was accordingly sealed and perfected by the court. Learned counsel for the 1st plaintiff only came to know of the sealed order on the morning of 6 October, shortly before the case was called for hearing.

**[4]** The 1st plaintiff's contention is that learned counsel for the defendants should not have filed the order for sealing as she was fully aware that the 1st plaintiff had written to the court asking for clarification. According to counsel she should have waited for the court to fix the appointment date. Further, the draft order had not been agreed upon and therefore it was improper for the defendants' counsel to have filed it for sealing. It was contended that counsel's act was irregular and an attempt to circumvent the court process. For this reason learned counsel for the 1st plaintiff applied to have the sealed and perfected order set aside.

**[5]** I acceded to counsel's application on 6 October 2009 as I was of the view that the order is a nullity. An order that is obtained irregularly is not a valid order and is liable to be set aside without the necessity of going through the appeal process. A null and void order is as good as no order at all. In *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21 Abdoolcader J (as he then was) when delivering the judgment of the Federal Court said:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon - in other words it is subject to a collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

**[6]** A draft order should not be filed for sealing if any of the terms is disputed and one party has written to the court for determination. In resisting the 1st plaintiff's application counsel for the defendants submitted that this court is not the proper forum before which the 1st plaintiff could seek to apply to set aside the sealed and perfected order. In support she cited the Federal Court case of *Hock Hua Bank v. Sahari Murid* [1980] 1 LNS 92. In my view that case has no application for the simple reason that the impugned order in that case was a perfectly valid order unlike the order in the instant case which was obtained irregularly.

**[7]** Counsels' conduct in filing the disputed draft order for sealing despite knowing that the 1st plaintiff had written to the court seeking for a clarification can only be described as unconscionable.

## Committal

**[8]** On 6 October 2009, after setting aside the sealed and perfected order I ordered the 1st defendant by its director Datuk Lawrence Sinsua, (2nd defendant) to be committed to the Kepayan prison and to be there imprisoned until further order. In my view having regard to the facts and circumstances of the case imprisonment is the proper order to be made against the 2nd defendant. Despite being in clear contempt of court the 2nd defendant has not shown any remorse whatsoever. Where a person is committed to prison for contempt of court he will only be released after he purges the contempt: *Corcoran v. Corcoran* [1950] 1 All ER 495.

**[9]** The background facts leading to the committal order are as follows. On 14 March 2003 the Kota Kinabalu High Court made the following orders against the defendants:

1. That the sum of RM2,230,000.00 be withdrawn from the SMK Engineering Account at OCBC Bank (Malaysia) Bhd of Kota Kinabalu Branch under Account No. 765-106796-8 and be forthwith disbursed and paid to the 1st plaintiff;

2. That the sum of RM2,230,000.00 be withdrawn from the SMK Engineering Account at OCBC Bank (Malaysia) Bhd of Kota Kinabalu Branch under Account No. 765-106796-8 and be forthwith disbursed and paid to the 2nd plaintiff through the account of the plaintiffs' solicitors, Messrs Lee & Kong of Kota Kinabalu; and

3. That the 1st plaintiff, 2nd plaintiff and the 1st defendant by their respective authorized representative shall, whether jointly or individually, within three (3) days from the date of this order withdraw or cause to be withdrawn the said sum of RM2,230,000.00 from the SMK Engineering Account No. 765-106796-8 in compliance with paragraph 1 and 2 of this order.

**[10]** The defendants appealed to the Court of Appeal against the above orders but their appeal was dismissed on 11 September 2004. The defendants then applied to the Federal Court for leave to appeal but the application for leave was likewise dismissed on 20 March 2007. The defendants made a last ditch effort to salvage their position by applying to the Federal Court seeking a review of the Federal Court's decision on 20 March 2007. This application too was dismissed by the Federal Court in November 2007.

**[11]** Despite having exhausted their legal process the defendants continued to defy the court order of 14 March 2003. In a way the appeal process had affected the effective execution date of the order of 14 March 2003. To the advantage of the defendants it was now no longer possible for them to comply with that part of the order which required them to withdraw the sum of RM2,230,000 "within three days from the date of this order", which meant three days from 14 March 2003.

**[12]** To alleviate the problem the plaintiffs applied under O. 45 r. 6 of the Rules of the High Court, 1980 to change the time of compliance of the order from three days from the date of the order to three days after service of the order applied for under O. 45 r. 6. The plaintiffs' application was allowed by the Deputy Registrar on 12 June 2009. The terms of para. (1) of the order are as follows:

> (1) the 1st plaintiff, 2nd plaintiff by its provisional liquidator and the 1st defendant by their respective authorized representative and/or signatory shall, whether jointly or individually, **within three (3) days from the date of service of this order**, withdraw or cause to be withdrawn and/or do whatsoever necessary for or incidental to the withdrawal of the two sums of RM2,230,000.00 from the SMK Engineering Account at OCBC Bank (Malaysia) Bhd of Kota Kinabalu Branch under Account No.765-106796-8 (including money held under REPO Account) in compliance with paragraphs (1) and (2) of the order dated the 14th day of March 2003. (emphasis added)

**[13]** No order for stay of execution was applied for nor granted by the court against the above order. The defendants filed an appeal in chambers against the order. On 27 July 2009 I dismissed the defendants' appeal. The defendants were therefore bound to comply with the order within three days from 12 June 2009. The order together with the order dated 14 March 2003 were served on the 1st defendant on 23 June 2009 and was personally accepted by the 2nd defendant.

**[14]** By letter dated 24 June 2009 the plaintiffs' solicitors notified the manager of OCBC Bank Malaysia Berhad Kota Kinabalu that the representative of the 1st and 2nd plaintiffs would withdraw the sum of money from the relevant account of SMK Engineering on 25 June 2009. On that date the plaintiffs' representative attended to OCBC Bank Malaysia Kota Kinabalu Branch and signed all forms and documents for the withdrawal of the sum of RM2,230,000 from the account of SMK Engineering in accordance with the terms of the court order.

**[15]** The next day the provisional liquidator from the department of Insolvency Malaysia as representative of the 2nd plaintiff attended to OCBC Bank Malaysia Kota Kinabalu Branch and signed all the necessary forms and documents necessary for the withdrawal of money.

**[16]** On 29 June 2009, more than five days after personal service of the court order, the plaintiffs' representative found out from the OCBC Bank that neither the 1st defendant nor the 2nd defendant, Datuk Lawrence Sinsua attended to the said bank to sign the necessary documents for withdrawal of the RM2,230,000. The 1st and 2nd defendants had therefore breached the terms of the court order dated 12 June 2009.

**[17]** On 29 June 2009 the 1st plaintiff wrote to the defendants demanding for compliance with the court order latest by 2nd July 2009. The 1st and 2nd defendants did not heed the 1st plaintiff's demand. The 1st plaintiff had no choice but to apply for committal against the 1st and 2nd defendants for willful disobedience of the court order.

**[18]** Contempt of court is the interference with the due administration of justice: *Attorney General v. Hislop & Anor* [1991] 1 All ER 911. Whether an act amounts to interference with the administration of justice depends on the facts and circumstances of each case: *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401.

**[19]** In *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 Abdul Hamid Omar LP said at p. 212:

> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

**[20]** In *Halsbury's Laws of Malaysia*, vol. 2 at p. 75 the learned authors have this to say on contempt of court:

> It is paramount, in the interest of the public, that every court has power and jurisdiction to punish persons who scandalize it or disobey orders made by it. If such a power is absent, then the public will lose confidence in the authority of the courts, leading to anarchy and disorder. This is the juridical basis for the law of contempt (*MBf Holdings Bhd v. Houng Hai Kong* [1993] 2 MLJ 516.

**[21]** On the facts of the present case it is clear to me that the disobedience by the 1st and 2nd defendants of the court order dated 12 June 2009 was wilful and blatant and is without a doubt an interference with the administration of justice. It is obvious that the defendants were (and still are) determined not to comply with the court order. Having carefully considered the affidavit evidence of both sides I was satisfied that the 1st plaintiff had proven beyond any reasonable doubt that the defendants were in contempt of court. In deciding whether the respondents were in contempt of court I reminded myself of what Lord Denning said in *Re Bramblevale Ltd* [1970] Ch 128, as follows:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.

**[22]** An order of committal to be effective must include the punishment for the contempt. Otherwise the committal order will be biting without a tooth. In *Lightfoot v. Lightfoot* [1989] 1 FLR 414 at pp. 416-417 Lord Donaldson MR made the following observations with regard to sentences for contempt of court:

> Sentences for contempt really fall into two different categories. There is the purely punitive sentence where the contemnor is being punished for breach. A common example, of course, is a non molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category.
>
> There is a second category which I might describe as a coercive sentence, where the contemnor has been ordered to do something and is refusing to do it. Of course, a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing, but, nevertheless, it also has a coercive element.

**[23]** For the contempt committed by the 2nd defendant I am of the view that the deterrent factor should be the paramount consideration.

**[24]** It was for reasons stated above that I ordered the disputed sealed and perfected committal order to be set aside and that the order should include an order that the 2nd defendant be committed to prison until he complies with the court order dated 12 June 2009.